

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

DANNY L HAMPTON,

Plaintiff,

v.

S. WONG, et al.,

Defendants.

No. 2:20-CV-1501-WBS-DMC

**FINDINGS AND RECOMMENDATIONS**

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the Court is plaintiff's complaint, ECF No. 1.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a "... short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply, concisely, and directly. See McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the complaint gives the defendant fair notice of the plaintiff's claim and the grounds upon which it

1 rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must allege  
 2 with at least some degree of particularity overt acts by specific defendants which support the  
 3 claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is  
 4 impossible for the Court to conduct the screening required by law when the allegations are vague  
 5 and conclusory.

6 On September 16, 2020, the Court issued an order addressing Plaintiff's  
 7 complaint. See ECF No. 10. The Court summarized Plaintiff's allegations as follows:

8 Plaintiff, Daniel Hampton, is an inmate at Mule Creek State  
 9 Prison. Plaintiff names as defendants: (1) Dr. S Wong, (2) Dr. Kelly  
 10 Kanwar, and (3) Dr. Zackhary. Plaintiff requests punitive and  
 compensatory damages from defendants in both their individual and  
 official capacities.

11 Plaintiff alleges that each of the defendants violated his  
 12 Eighth Amendment rights by failing to meet his medical needs. Plaintiff  
 13 alleges that Dr. Wong violated his Eighth Amendment rights by ignoring  
 14 medical request forms for months and not giving proper instruction as to  
 15 the treatment of his infected tooth to Dr. Kanwar and Dr. Zackhary.  
 16 Plaintiff alleges that Dr. Kanwar violated his Eighth Amendment rights by  
 17 performing a surgery to implant metal plates in his jaw without removing  
 18 an infected and impacted tooth. Plaintiff alleges that Dr. Zackhary  
 19 violated his Eighth Amendment rights by removing the plates from his  
 20 jaw, removing the infected tooth, but then failing to replace the plate. The  
 21 injuries plaintiff alleges arise from an infected, impacted wisdom tooth,  
 22 surgery for a broken jaw, and a subsequent surgery removing the infected  
 tooth. See ECF No. 1 at 3. He claims to continue suffering complications  
 including the inability to taste with the left side of his mouth and tongue,  
 inability to sleep on the left side of his face, inability to shave with an  
 electric razor, and inability to chew solid foods, as well as being unable to  
 treat several cavities due to a hairline fracture in plaintiff's jaw. Id.

23 Plaintiff began reporting his pain using 7219 medical forms  
 24 sometime in early December of 2018. Id. at 5. He continued filing an  
 25 unspecified number of complaints that went unanswered through April 1,  
 26 2019. Id. Plaintiff claims to have attempted to speak to a facility nurse,  
 27 who he could not identify, at an unspecified time, and that the nurse did  
 28 not respond to him. Id. Between December of 2018 and April 1, 2019,  
 plaintiff claims to have been provided no medical services. Id.

As part of plaintiff's annual physical, the date of which is  
 unspecified, he was examined by Duong Tanh, a facility dentist. Id. The  
 dentist told him that he had an impacted wisdom tooth that was "grossly  
 infected." Id. The dentist contacted plaintiff's primary care provider, one  
 of the named defendants, Dr. S. Wong, and informed him of plaintiff's  
 medical condition. Id. at 6.

Dr. Wong met with the plaintiff the next day to provide an  
 examination with what plaintiff described as, "clear reluctance." Id.  
 During this meeting plaintiff told Dr. Wong he had been experiencing the  
 pain for five months, and that he had sent Dr. Wong multiple 7219  
 medical forms. Id. Dr. Wong indicated to plaintiff that he had seen the  
 forms, but that plaintiff had only said that he was in pain, which was not

specific enough information to call plaintiff in for an examination. Id. Plaintiff does not argue that he included anything other than a general pain he was experiencing in the forms provided to Dr. Wong. Id. Dr. Wong told plaintiff that he would be scheduled to go to the hospital to have the tooth removed. Id. The original scheduled date for the tooth removal was not specified by plaintiff. Id.

On April 15, 2019, before plaintiff was scheduled to have his tooth removed, he had a nightmare which caused him to fall off his bunk and break the left side of his jaw. Id. at 7. Plaintiff was sent to San Joaquin General Hospital for treatment and was seen by another of the named defendants, Dr. Kelly Kanwar. Id. During a consultation relating to plaintiff's surgery for his broken jaw on April 16, 2019, plaintiff asserts that he told Dr. Kanwar about his infected tooth and the pain it had caused him. Id. Dr. Kanwar informed plaintiff he had not been told about a tooth removal by Dr. Wong, and that he did not intend to remove the tooth. Id. Plaintiff refused to have his mouth wired shut due to preexisting medical conditions and instead chose to undergo a procedure to place plates and screws in his jaw. Id. at 8. As Dr. Kanwar left the consultation, plaintiff raised the issue of his impacted tooth, and the doctor did not respond. Id.

Plaintiff's surgery to implant the plate occurred on April 17, 2019. Id. at 7. Plaintiff asserts that Dr. Kanwar failed to remove the infected tooth and placed two of the screws securing the plate through the tooth. Id. at 8, 10. Plaintiff further asserts that this caused his jaw to heal incorrectly and caused the hardware to become infected, and require a second surgery to remove the hardware. Id. at 8, 10.

On July 26, 2019, plaintiff met with Dr. Wong. Id. at 11. During this meeting plaintiff complained of extreme pain. Id. at 12. Dr. Wong told plaintiff that the pain was normal, to "put on his big boy pants," and refused to provide plaintiff with painkillers other than Ibuprofen. Id. The next day plaintiff went to CTC/TTA for medical treatment and was taken to Clinic Community Medical Center, where he met with named defendant, Dr. Zachary. Id. at 12-13. Dr. Zachary removed the plates from plaintiff's jaw. Id. at 13. When plaintiff asked if Dr. Zachary would be replacing the plates, Dr. Zachary told plaintiff that Dr. Wong had not noted the plates were to be replaced. Id.

Plaintiff claims that CDCR/Medical, San Joaquin General Hospital, and Clinic Community Medical Center have conspired in making false medical reports related to plaintiff's condition. Id. at 14.

Plaintiff alleges that the defendants' actions as described above result in an Eighth Amendment violation for failure to meet medical needs.

ECF No. 10, pgs. 2-4.

The Court concluded the complaint states a cognizable claim for relief against Defendant Wong based on Plaintiff's allegations Defendant Wong ignored requests for medical care. See id. at 4. The Court, however, determined the complaint is insufficient as to Plaintiff's Eighth Amendment claim against Defendant Wong based on failure to properly instruct other defendants. See id. The Court also determined the complaint fails to state a claim for relief against any other named defendant. See id.

As to claims found to be defective, the Court stated:

The treatment a prisoner receives in prison and the conditions under which the prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993); Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment “. . . embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102 (1976). Conditions of confinement may, however, be harsh and restrictive. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison officials must provide prisoners with “food, clothing, shelter, sanitation, medical care, and personal safety.” Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates the Eighth Amendment only when two requirements are met: (1) objectively, the official’s act or omission must be so serious such that it results in the denial of the minimal civilized measure of life’s necessities; and (2) subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison official must have a “sufficiently culpable mind.” See id.

Deliberate indifference to a prisoner’s serious illness or injury, or risks of serious injury or illness, gives rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and mental health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995). An injury or illness is sufficiently serious if the failure to treat a prisoner’s condition could result in further significant injury or the “. . . unnecessary and wanton infliction of pain.” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994). Factors indicating seriousness are: (1) whether a reasonable doctor would think that the condition is worthy of comment; (2) whether the condition significantly impacts the prisoner’s daily activities; and (3) whether the condition is chronic and accompanied by substantial pain. See Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

The requirement of deliberate indifference is less stringent in medical needs cases than in other Eighth Amendment contexts because the responsibility to provide inmates with medical care does not generally conflict with competing penological concerns. See McGuckin, 974 F.2d at 1060. Thus, deference need not be given to the judgment of prison officials as to decisions concerning medical needs. See Hunt v. Dental Dep’t, 865 F.2d 198, 200 (9th Cir. 1989). The complete denial of medical attention may constitute deliberate indifference. See Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986). Delay in providing medical treatment, or interference with medical treatment, may also constitute deliberate indifference. See Lopez, 203 F.3d at 1131. Where delay is alleged, however, the prisoner must also demonstrate that the delay led to further injury. See McGuckin, 974 F.2d at 1060.

Negligence in diagnosing or treating a medical condition does not, however, give rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 106. Moreover, a difference of opinion between the prisoner and medical providers concerning the appropriate course of

1 treatment does not give rise to an Eighth Amendment claim. See Jackson  
2 v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

3 \* \* \*

4 Plaintiff does not provide sufficient facts to show that Dr.  
5 Wong acted with deliberate indifference in not providing instructions to  
6 Dr. Kanwar or Dr. Zackhary relating to the surgeries that plaintiff  
7 experienced. While plaintiff may have disagreed with these actions, that  
8 only demonstrates a difference of medical opinion and is not enough to  
9 suggest deliberate indifference. See Jackson, 90 F.3d at 332. Further,  
10 even if failing to remove the tooth prior to implantation of the plate, and  
11 failure to replace the plate after removal of the tooth were incorrect, such  
12 conduct would only show negligence, which does not give rise to a claim  
13 under the Eighth Amendment. See Estelle, 429 U.S. at 106.

14 While it does not appear that plaintiff can allege facts to  
15 state a cognizable claim against defendant Wong based on failing to  
16 properly instruct, in an abundance of caution the Court will nonetheless  
17 grant plaintiff leave to amend.

18 \* \* \*

19 Plaintiff's allegations against Dr. Kanwar and Dr. Zackhary  
20 fail to state an actionable Eighth Amendment claim. Plaintiff contends  
21 that Dr. Kanwar should have removed the tooth before the surgery to place  
22 the plates in plaintiff's jaw and that Dr. Zackhary should have replaced the  
23 plate in plaintiff's jaw once the tooth had been removed. These  
24 allegations, however, demonstrate a difference of opinion regarding  
25 medical treatment and, as such, do not allege a violation of the Eighth  
26 Amendment. See Jackson, 90 F.3d at 332. Even if Plaintiff's allegations  
27 do not show that the decisions that the doctors made were incorrect,  
28 negligence in medical diagnosis or treatment alone does not give rise to a  
claim under the Eighth Amendment. See Estelle, 429 U.S. at 106.

Again, while it does not appear that plaintiff can allege  
facts to state a cognizable claim against defendants Kanwar and Zackhary,  
in an abundance of caution the Court will nonetheless grant plaintiff leave  
to amend.

ECF No. 10, pgs. 5-8.

Plaintiff was provided an opportunity to file a first amended complaint and  
cautioned that failure to do so within the time provided would result in findings and  
recommendations that the defective claims be dismissed. Plaintiff has not filed an amended  
complaint within the time provided and the Court now recommends dismissal of Plaintiff's  
Eighth Amendment claim against Defendant Wong based on Plaintiff's allegations Defendant  
Wong failed to properly instruct other defendants as well as all of Plaintiff's claims against  
Defendants Kanwar and Zackhary. By separate order issued herewith, the Court directs service  
on Defendant Wong as to Plaintiff's claim that Defendant Wong ignored requests for medical

1 care.

2 Based on the foregoing, the undersigned recommends that:

3 1. Plaintiff's claim against Defendant Wong based on Plaintiff's allegations  
4 Defendant Wong failed to properly instruct other defendants be dismissed;

5 2. Plaintiff's claims against Defendant Kanwar and Zackhary be dismissed  
6 and Kanwar and Zackhary be terminated as defendants to this action; and

7 3. This action proceed solely on Plaintiff's claim against Defendant Wong  
8 that Defendant Wong ignored requests for medical care.

9 These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
11 after being served with these findings and recommendations, any party may file written objections  
12 with the Court. Responses to objections shall be filed within 14 days after service of objections.  
13 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.  
14 Ylst, 951 F.2d 1153 (9th Cir. 1991).

15  
16 Dated: March 8, 2021



DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE